Desert Aggregates *and* Operating Engineers Local No. 3, International Union of Operating Engineers, AFL–CIO. Cases 32–CA–18653 and 32–CA–18726

September 23, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN SCHAUMBER

On May 28, 2002, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs, and the General Counsel and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by soliciting and promising to remedy employee grievances[1] and did not violate Section 8(a)(1) by granting employee Daniel Harris a wage increase. Unlike the judge, however, we find that the Respondent did not violate Section 8(a)(1) by threatening to replace employees and that the Respondent violated Section 8(a)(3) and (1) by laying off employees Mark Gregg and Wendy Miller.

The judge did not acknowledge or address the General Counsel's posthearing motion to amend the complaint to allege that the Respondent's general manager, Bruce Bunting, violated Section 8(a)(1) by telling employees during a captive audience meeting that he could make no changes because the union election had not been canceled. We deny the motion, for the reasons explained below. Finally, although we find the layoffs of Gregg and Miller unlawful, we agree with the judge that a *Gissel* bargaining order is not warranted in this case. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).[2]

[1] Specifically, the judge concluded that the Respondent, by its labor consultant, William Scott, solicited and promised to remedy employee grievances including the employees' dissatisfaction with the plant manager, Ben Boyd. No exceptions were filed to this finding.

[2] The Charging Party excepts to the judge's failure to find that the Respondent violated Sec. 8(a)(1) by holding a captive audience meeting the day before the scheduled election and by coercively interrogating employees. We find no merit in these exceptions, as the issues raised are not alleged in the complaint and the General Counsel has not moved to amend the complaint to include them. The Charging Party cannot enlarge upon or change the General Counsel's theory of the case. See, e.g., *Kimtruss Corp.*, 305 NLRB 710, 711 (1991).

[3] As found by the judge, there were approximately 11 employees in the bargaining unit at the time of the events at issue.

A. Factual Background

Employee Mark Gregg initiated a union organizing campaign at the Respondent's quarrying and stone aggregate processing plant in October or November 2000. Employee Wendy Miller was an early and openly active supporter of the union campaign.[3]

In December, Plant Manager Ben Boyd, having learned of the union campaign, told Gregg that he wished the facility "would go union" so that it would be easier for him to "get rid of an employee and just call the [Union's hiring] hall" for a replacement. Between December 25 and January 1, Boyd called his supervisor (and Respondent's general manager), Bruce Bunting, while Bunting was on vacation, to inform him of the Union's organizing efforts. Bunting immediately suspected Gregg as a leading union supporter. During his vacation, Bunting decided to lay off Gregg and Miller because business was slow.

On January 4, 2001, after returning from vacation, Bunting met with employee Daniel Harris and informed him that he would receive a $1.20-per-hour raise. (Harris actually received $1.45 rather than $1.20 raise, because, according to Bunting, the office manager informed him that the lesser amount would put Harris at a salary level not in the computerized payroll system.) At the time Bunting announced the raise, Harris asked whether the increase was prompted by the union campaign, and Bunting replied that it was not. Harris had requested a raise from Bunting during the Company's holiday party in mid-December, and Bunting had told him that he would be reviewed for a raise around the first of the year. Bunting had granted wage increases of between $1 and $4 to several other employees in the 2 months prior to Harris' request.

Also on January 4, Office Supervisor Gloria Uny told Miller that two employees had come to the office to inform Bunting about the employees' union activities. Uny advised Miller to "watch her ass." On January 5, Bunting laid off Miller, explaining that he was doing so because "things were slow," and he needed to retain workers who, unlike Miller, could do maintenance work which the Respondent customarily did during slow periods. Bunting intended to lay off Gregg for the same reasons, but, because Gregg was absent, did not do so until January 8. Later on January 5, Miller and several other union supporters delivered a recognition petition to Bunting. The Union filed its representation petition on Janu-

ary 8, and, on January 15, the Respondent and the Union stipulated to a Board-conducted election to be held on February 16.

Shortly after the layoffs, Harris asked Boyd whether the layoffs had been prompted by the union organizing campaign. Boyd replied, "Hey dude, I didn't have anything to do with it, it was all f—ing Brucie [Bunting]." According to Harris, Boyd also said that if the Union was elected it would be easier for him to get rid of employees he didn't like, in particular temporary employees that the Respondent sometimes got from Jobs-R-Us.

A few weeks before the election, the Respondent hired a labor consultant, William Scott, who spoke to the employees individually and informed Bunting that their primary concerns were with benefits and Boyd's mistreatment of them. Scott told the employees that the union campaign had "rung bells all the way to the top" of the Company and that they should "give the company a year" and see what changes would be made. Scott specifically told employees that "Boyd was on his way out." Bunting also held several meetings with the employees at which he urged them to "to give us a year and things will change."

On February 15, at the Union's request, the scheduled election was postponed pending resolution of the instant unfair labor practice charges. At a captive audience meeting held the same day, Bunting stated that because the election was postponed rather than canceled, his hands were tied, and he could not make any changes.

At the end of March, after business began to pick up, Bunting sent recall notices to Gregg and Miller, but they declined to return to work.

B. Discussion

1. Threats of replacement

The judge concluded that, although Plant Manager Boyd expressed support for the Union when he told Gregg and Harris that he hoped the facility would "go Union" so that it would be easier for him to "get rid of an employee and just call the [Union's hiring] hall" for a replacement, those statements could reasonably be understood as threats of replacement in violation of Section 8(a)(1). The Respondent excepts to this conclusion. We find merit in the Respondent's exception.

Plant Manager Boyd's statements to both Harris and Gregg indicate that he wanted the plant to go union because he believed that unionization would make his job easier by permitting him to more readily replace unsatisfactory workers. As explained by the Respondent, Boyd's dissatisfaction with certain temporary workers was widely known. Regardless of whether Boyd's view was correct, it is an unreasonable distortion of his words to construe his essentially prounion remark as a threat to replace the Respondent's permanent employees because of their support for the Union. We therefore find that this remark could not reasonably have tended to interfere with Gregg or Harris' exercise of their Section 7 rights.[4]

Our colleague argues that Boyd's statement would discourage employees from supporting the Union. The argument has no merit. Boyd's statement indicated that he was prounion, and his plans for replacing unsatisfactory workers involved the active cooperation of the Union. In this context, it is difficult to see how Boyd's statement would *discourage* employees from supporting the Union. If anything, such employees would want to be in good standing with the Union.

2. Harris' wage increase

The judge concluded that Bunting's January 4 grant of Harris' request for a raise was not unlawful, because it was consistent with Bunting's promise, before learning of the union campaign, to review the request at the beginning of the year, and because it was consistent in amount with raises Bunting had granted just prior to Harris' request. The General Counsel argues that Bunting's promise to review Harris' request does not explain the timing of the actual increase because it did not amount to a decision to grant the raise. The General Counsel and the Charging Party also argue that, because the increase that appeared in Harris' paycheck was 25 cents greater than the raise he was told he would receive, the amount of the increase was unlawful. We find no merit in these exceptions.[5]

An employer's legal duty in deciding whether to grant a benefit during the critical period before an election is to act as it would have if the union were not present. *Red's Express*, 268 NLRB 1154, 1155 (1984). Thus, while the

[4] Contrary to the majority, Member Liebman would find Boyd's statement unlawful. Whether or not Boyd's statement may be characterized as "pro-union," his words sent a clear message that he viewed unionization as making it easier to remove employees he did not like from their jobs. His comment is tantamount to an assertion that the election of the Union would undermine employees' job security. Moreover, Boyd did not simply state a general opinion about the consequences of unionization but indicated his intention to use the Union in order to eliminate employees he disliked. He made the statement to Gregg and Harris, two employees with whom he had known difficulties. Clearly, such a statement would have a reasonable tendency to discourage these employees from supporting the Union.

[5] Although Bunting announced the increase to Harris before the Union filed its recognition petition, the wage increase did not actually show up in Harris' paycheck until a week after it was announced, hence during the critical period. Thus, the judge properly treated the wage increase as a grant of benefits during the critical period, and no party argues to the contrary. See *Wis-Pak Foods, Inc.*, 319 NLRB 933 fn. 2 (1995) (employer's change of its overtime policy, announced outside the critical period but taking effect after filing of petition, was objectionable conduct).

Board has inferred from the timing of such a grant of benefit that it was unlawful, the Respondent may rebut this inference by showing that the timing of its action is explained by reasons other than the pending election. *B & D Plastics*, 302 NLRB 245 (1991); see also *DMI Distribution of Delaware*, 334 NLRB 409, 410 and fn. 9 (2001) (applying the same analysis to unfair labor practice cases as to objections cases); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993). Even where an employer justifies the timing of such a benefit, however, the amount of the benefit may be unlawful. See, e.g., *Comcast Cablevision*, 313 NLRB 220, 248–250 (1993).

We agree with the judge that the Respondent has demonstrated that Bunting would have granted Harris a wage increase when he did even in the absence of the union campaign. Bunting testified without contradiction that Harris was overlooked for a raise when the others were granted prior to his request and that he deserved a pay increase, but that Bunting delayed granting his request because of the inappropriate manner in which it was made during the company holiday party. Moreover, Bunting testified without contradiction that he informed Harris of his displeasure when he stated that he would review the request at the beginning of the year.[6] There is no evidence that Bunting's handling of Harris' request was otherwise inconsistent with his past practice. See *Comcast Cablevision*, 313 NLRB at 247 (timing of wage increase lawful because consistent with employer's previously announced intention to review wages annually); *LRM Packaging*, 308 NLRB 829 (1992) (grant of benefits, including wage increase, lawful because promised and set in motion before union campaign and consistent with past practice). Under these circumstances, we agree with the judge that the timing of Harris' wage increase was governed by factors other than the pending election and could not reasonably tend to interfere with Harris' exercise of his Section 7 rights.

We also agree with the judge that the amount of the increase was lawful. As the judge found, Harris' raise was within the range of raises that other employees had recently received. Although it is true, as the General Counsel and the Charging Party point out, that the judge failed to consider the discrepancy between the increase Bunting told Harris he would receive ($1.20/hr.) and the raise Harris actually received ($1.45/hr.), the judge apparently credited Bunting's uncontradicted testimony that he gave the greater increase after learning from the office manager that the computerized payroll system did not include a step for the salary that would have resulted from the lesser increase. There is some documentary evidence to support Bunting's explanation, and the General Counsel has offered no evidence to the contrary. We therefore agree with the judge that the increase was lawful both in timing and amount.

3. The layoffs of Gregg and Miller

General Manager Bunting decided to lay off union supporters Gregg and Miller while on vacation, after being informed by Plant Manager Boyd that a union organizing campaign was underway. Bunting admitted that he immediately suspected Gregg of being a leading union organizer. Nevertheless, the judge found that the layoffs were lawful. We reverse.

To establish an unlawful layoff, the General Counsel must show, by a preponderance of the evidence, that the laid-off employees' union activity was a motivating factor in the employer's decision. Where the General Counsel makes this showing, the burden shifts to the employer to show that it would have taken the same action even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). If the General Counsel makes a strong showing of unlawful motive, the employer's rebuttal burden is substantial. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). If the reasons given by the Respondent for its action are pretextual—that is, either false or not in fact relied upon—the employer fails by definition to show that it would have taken the same action, for those reasons, absent the protected conduct. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

The judge found that the General Counsel had made a strong showing that the layoffs of Gregg and Miller were unlawfully motivated. No party excepted to this finding.

The judge also concluded, however, that the Respondent had demonstrated that it would have laid off Gregg and Miller even in the absence of their union activity because of the slowdown in its business and their lack of maintenance skills needed during slow periods. In exceptions, the General Counsel argues that the Respondent's economic rationale for the layoffs is pretextual, and that, in any event, the Respondent did not prove that it would have laid Gregg and Miller off if they had not engaged in union activity. We find it unnecessary to decide whether the Respondent's economic explanation for the layoffs was pretextual, because we conclude that, even if its stated reasons played some role in the deci-

[6] Compare *Mercy Hospital*, 338 NLRB No. 66, slip op. at 1 (2002), in which the Board found that an employer's announcement of a wage increase during the critical period was unlawful, although the employer had been considering the increase and had discussed it preliminarily with employees, because the employer presented no evidence regarding its decision as to the timing of the announcement.

sion, the Respondent has not demonstrated by a preponderance of the evidence that it would have taken the same action in the absence of Gregg and Miller's protected activity. See *Merillat Industries*, 307 NLRB 1301, 1303 (1992) (employer is required to establish its *Wright Line* defense by a preponderance of the evidence).

The Respondent's rock plant is a seasonal operation. During the slow months at the beginning of each year, the Respondent focuses on maintenance and repair of its equipment, in which most of its employees have some skill. Neither Gregg nor Miller does such work: Gregg runs the rock plant; Miller does office and laboratory work and drives the Respondent's water and haul trucks.

At the beginning of 2000, the Respondent's business declined precipitously and did not recover. As a result, Bunting laid off several employees in April and May, including Harris and Brian Raffel—both of whom had maintenance skills—while retaining Gregg and Miller, who did not.

Bunting testified that he could generally predict how business would be 1 to 3 months in advance. He also testified that he realized in the fall of 2000 that business would not improve in 2001. At the end of November 2000, however, Bunting hired two new employees, Rob Thieman and Ricardo Barrera, who were skilled in maintenance and repair work. Bunting testified that he decided to lay off both Gregg and Miller during his vacation between December 25, 2000, and January 1, 2001, because business was slow, and he needed to retain employees who could do maintenance and repair work.

In these circumstances, the Respondent's economic justification for the layoffs is suspect. Bunting admittedly knew at the time he hired Barrera and Thieman, 5 weeks before laying off Gregg and Miller, that the Respondent's business would not improve in 2001. The fact that Bunting felt financially able to hire two additional employees at the end of November significantly undercuts the Respondent's assertion that it was financially necessary to lay off two employees at the beginning of January. Cf. *Goldtex, Inc.*, 309 NLRB 935, 937 (1992), modified on other grounds 14 F.3d 1008 (4th Cir. 1994) (employer did not establish that its major economic setback motivated layoffs where it expanded its business immediately after losing biggest customer and did not lay off employees until several months later, a few days after several employees testified against employer in an unfair labor practice case).

But even if economic conditions warranted laying off two employees in 2001, the Respondent has not persuasively shown why Gregg and Miller were the ones selected. The Respondent argues that it laid them off because they lacked the skills necessary to perform repair and maintenance work. Under almost identical circumstances in early 2000, however, the Respondent laid off two employees who possessed those skills, while retaining Gregg and Miller, who did not. In fact, after hiring Thieman and Barrera in late 2000, the Respondent had the same number of employees with maintenance and repair skills as it had retained after the earlier layoffs. Moreover, the Respondent does not argue that it hired Barrera and Thieman at the end of 2000 in anticipation of laying off Gregg and Miller. Indeed, Bunting admittedly did not decide to lay off Gregg and Miller until he learned of the union campaign.

In addition, the Respondent does not argue that it required all of its employees to be able to do some maintenance and repair work or that there was no other work for Gregg and Miller to do during the slow period.[7] In fact, Harris testified without contradiction that after the layoffs, he stopped doing maintenance and repair work in order to take over Gregg's duties. The Respondent, thus, has not explained why it had to lay Gregg and Miller off in 2001 when it did not do so under nearly identical circumstances in 2000. We conclude that, even assuming that Gregg and Miller's lack of maintenance and repair skills was one factor in their selection for layoff, the Respondent has not shown by a preponderance of the evidence that they would have been selected in the absence of their protected activity.

4. Motion to amend

In his posthearing brief to the judge, the General Counsel moved to amend the complaint to allege that Bunting violated Section 8(a)(1) by stating at a February 15 captive audience meeting that he could make no changes because the union election had been postponed rather than canceled.[8] The judge did not rule on the motion, and the General Counsel excepts to his failure to do so. We deny the General Counsel's motion to amend.

[7] Bunting testified that he verified before laying Miller off that there was insufficient office work for her to do. There is also evidence that lab work, another of Miller's responsibilities, was slow during the winter. There is no evidence, however, that there was less of these kinds of work in 2001 than in 2000, when Miller was retained.

[8] Specifically, the General Counsel's posthearing brief states: "According to the Respondent's own testimony, Bunting stated to employees at a captive audience meeting on or about February 15, 2001, that because the election was postponed rather than cancelled, his hands were tied, and that only if the Union were out of the picture could he make any changes, including changes to pay rates. This testimony was corroborated by Daniel Harris. . . . Although the statement was not alleged in the Consolidated Complaint, the statement is closely related to the subject matter of the Complaint and Respondent had an opportunity to litigate it at trial. The General Counsel accordingly moves to amend the Complaint to allege this statement by Bruce Bunting on or about February 15, 2001, as an additional violation of Section 8(a)(1) of the Act."

Under well-established precedent, the Board may find a violation not alleged in the complaint, even where the General Counsel has not filed a motion to amend, if the issue is closely related to the subject matter of the complaint and has been fully and fairly litigated. See, e.g., *Williams Pipeline Co.*, 315 NLRB 630 (1994); *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Moreover, the Board has concluded that where the respondent's witness testified to the facts giving rise to the unalleged violation, no party has objected to the testimony, and the respondent has had an opportunity to further explore the issue during the hearing, the "fully litigated" requirement is met. Id. However, whether a matter has been fully litigated also "rests in part on whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." *Pergament United Sales*, 296 NLRB at 335. Thus, the Board has found that an unalleged violation is not necessarily fully litigated simply because the facts giving rise to it emerge incidentally during the hearing. *Middletown Hospital Assn.*, 282 NLRB 541, 543 (1986). Because Bunting's testimony about the captive audience meetings emerged incidentally, and because the General Counsel's failure to allege a violation on that basis may have hindered the Respondent in presenting exculpatory evidence, we conclude that the Respondent did not have notice that the lawfulness of Bunting's February 15 statement was at issue and, consequently, that it was not fully litigated.

On direct examination, the Respondent's counsel asked Bunting about captive audience meetings held in the weeks prior to the election during which Bunting used materials supplied by the Respondent's labor consultant. It was not until counsel for the General Counsel's cross-examination, however, that Bunting's testimony regarding his February 15 statement was elicited. Cf. *Meisner Electric, Inc.*, 316 NLRB 597 (1995) (unalleged 8(a)(1) violation fully litigated where employer's witness testified to making the unalleged statement on direct examination by employer's counsel); *Pergament United Sales*, 296 NLRB at 333 (unalleged violation fully litigated where based in part on the testimonial admissions of respondent's own witnesses on direct examination). Bunting further testified on cross-examination that the changes to which he was referring included wage increases and getting rid of Plant Manager Boyd. Counsel for the General Counsel was obviously aware of Bunting's February 15 statement before he cross-examined Bunting, because the matter was not explored on direct examination; nevertheless, he made no motion to amend the complaint when he elicited testimony on this point or at any time during the hearing. He did not do so until his posthearing brief and offered no explanation for his delay.

Because the Board has considered the existence of qualifying language and other circumstances in deciding whether statements similar to Bunting's violate the Act,[9] the Respondent might have sought to adduce such evidence had the General Counsel made its motion to amend during the hearing. Although the Respondent had an opportunity, on redirect, to flesh out the circumstances of the statement once it was elicited on cross-examination, we are not persuaded that it had reason to know it should do so because the lawfulness of the statement might be at issue. Because counsel for the General Counsel failed to place the lawfulness of the statement at issue during the hearing, the Respondent was deprived of the opportunity to adequately address the question. We therefore deny the motion.

5. *Gissel* bargaining order

The General Counsel and the Charging Party have excepted to the judge's finding that a *Gissel* bargaining order is not warranted in this case. As it is undisputed that the Union had a card majority among the Respondent's production and maintenance employees, the only issue here is whether the Respondent's unlawful conduct is so pervasive or severe as to render traditional remedies insufficient to reestablish the laboratory conditions necessary for a fair election. *NLRB v. Gissel Packing Co.*, 395 U.S. at 612–613. Although we have found, contrary to the judge, that the layoffs of Gregg and Miller were unlawful, we nevertheless decline to issue a bargaining order here.

The Supreme Court in *Gissel* recognized two kinds of employer conduct that may warrant the imposition of a bargaining order: "'outrageous and pervasive unfair labor practices' ('category I') and 'less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes' ('category II')." *Gissel Packing Co.*, 395 U.S. at 613–

[9] See, e.g., *Signal Knitting Mills*, 237 NLRB 360, 361 (1978) (employer's notice indicating that benefits changes were frozen during union campaign violated Sec. 8(a)(1) in absence of qualifying language that employer "freeze" would apply only to benefit and/or wage increases not in accord with employer's past practice); *Marathon Metallic Building Co.*, 224 NLRB 121, 122–123 (1976) (employer's statement that wages were frozen during pendency of election petition unlawful, even in absence of evidence that employees expected a wage increase, because "it cannot be found that they reasonably expected not to receive any increases"); cf. *Village Thrift Store*, 272 NLRB 572, 572–573 (1984) (employer's statement that wages would be frozen until union matter settled not unlawful because employer has no fixed system of regularly scheduled increases).

614. Here, the judge correctly characterized the case as of the latter type.[10] In such cases, the Board considers both the extensiveness of the employer's unfair labor practices and their likelihood of recurrence in determining whether a bargaining order is appropriate. See, e.g., *St. Agnes Medical Center*, 304 NLRB 146, 147–148 (1991). A *Gissel* order is an extraordinary remedy, however; the preferred route is to provide traditional remedies for an employer's unfair labor practices and to hold an election, wherever such remedies may be sufficient to cleanse the atmosphere of the effects of the unlawful conduct. *Aqua Cool*, 332 NLRB 95, 97 (2000).

Here, the Respondent unlawfully solicited and promised to remedy employee grievances and laid off two leading union supporters for a 3-month period. Although few in number, these are serious violations. In particular, the layoffs of Gregg and Miller constitute "hallmark" violations, which the Board views as highly coercive because of their potentially long-lasting impact. *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212–213 (2d Cir. 1980). However, the Board has also held that such serious hallmark violations as discriminatory discharge do not necessarily create an atmosphere in which free and fair elections cannot be held. Thus, for example, in *Phillips Industries*, 295 NLRB 717, 718–719 (1989), the Board declined to issue a bargaining order in spite of the employer's unlawful discharge of two union supporters, because those violations, even when combined with the employer's interrogation of employees, did not render a fair election impossible. Similarly, in *Hospital Shared Services*, 330 NLRB 317, 318–319 (1999), the Board found traditional remedies adequate to redress the employer's threat of job loss, discriminatory refusal to rehire an employee because of his union affiliation, solicitation and promise to remedy grievances, interrogation of an employee, and promise of benefits to job applicants who would oppose the union.[11]

We find that the Respondent's unfair labor practices were not so numerous or severe as to warrant a bargaining order, even in a small bargaining unit. Although the layoffs of Gregg and Miller were unlawful, their effect on employees was mitigated by the facts that (1) a decline in business was at least a colorable explanation of the layoffs, from the perspective of other employees, especially given the earlier layoff; and (2) the Respondent attempted to recall both employees as soon as its business improved. Cf. *M.J. Metal Products*, 328 NLRB 1184, 1186 (1999) (issuing bargaining order and noting the absence of evidence that the employer had attempted to reinstate the discriminatorily discharged employees). We conclude that a bargaining order is unwarranted and that traditional remedies will suffice to ensure a fair election and erase the effects of the Respondent's unfair labor practices.[12]

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 3.

"3. By laying off employees Mark Gregg and Wendy Miller because of their union activity, the Respondent violated Section 8(a)(3) and (1) of the Act."

AMENDED REMEDY

In addition to the remedies recommended by the judge, we shall order the Respondent to take the following affirmative action. Having found that the Respondent unlawfully laid off Mark Gregg and Wendy Miller, we shall order the Respondent to make them whole for their loss of earnings from the dates of their unlawful layoffs to the dates of their offers of recall. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, the Respondent will be required to remove from its records all references to the unlawful layoffs of Gregg and Miller and to

[10] The judge inadvertently identified this type of case as a "category 3" case. As indicated, the Board has characterized such cases as "category II" cases.

[11] See also *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339 (2000) (bargaining order not warranted where employer made threats of closure, solicited grievances and implicitly promised to remedy them, interrogated employees, and granted several benefits, including wage increases and bonuses, to union supporters); *Burlington Times, Inc.*, 328 NLRB 750 (1999) (bargaining order not warranted where employer threatened plant closure, made noneconomic grants of benefit including discharge of an unpopular supervisor, promised to improve wages and other benefits, and solicited grievances).

[12] Contrary to her colleagues, Member Liebman would find a Gissel bargaining order warranted in this case. First, in her view, the Respondent has committed several hallmark violations, not only unlawfully laying off the foremost union supporters in a unit of approximately 11 employees but also threatening to replace employees if the Union was elected. The long-lasting and substantially inhibiting effect of these highly coercive violations is not likely to be dissipated or diluted in a unit of such small size. Cf. *Phillips Industries*, 295 NLRB at 718–719 (unlawful discharge of two employees in a 90-person unit did not warrant a *Gissel* bargaining order in part because of the size of the unit).

Second, even assuming that the recall of an employee may in some circumstances mitigate the coercive effect of his unlawful layoff, see *Paul Distributing Co.*, 264 NLRB 1378, 1379 (1982), the Respondent's recall of Gregg and Miller did not do so here. Unlike the unlawfully laid-off employees in *Paul Distributing Co.*, who were recalled promptly and actually returned to work, Gregg and Miller were not recalled for 3 months and declined to return to work at that time. Because Gregg and Miller did not return to work, and because there is no evidence that the Respondent's other employees even knew of their recall, it is difficult to see how the Respondent's offers of recall can mitigate the coercive effect of the layoffs on its other employees. In light of the small unit and serious violations here, Member Liebman would grant the *Gissel* order.

notify them in writing that this has been done and that the layoffs will not be used against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Desert Aggregates, Ducor, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting and promising to remedy grievances in order to discourage union activities.

(b) Laying off employees because of their union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Mark Gregg and Wendy Miller whole, with interest, for their loss of earnings from the dates of their unlawful layoffs to the dates of their offers of recall.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of Wendy Miller and Mark Gregg, and within 3 days thereafter notify them that this has been done and that the unlawful action will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Ducor, California facilities copies of the attached Notice.[13] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. September 23, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT solicit and promise to remedy employee grievances in order to discourage union membership or activities.

WE WILL NOT lay off employees because of their union membership or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL make Mark Gregg and Wendy Miller whole, with interest, for their loss of earnings from the dates on

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

which we unlawfully laid them off to the dates on which we recalled them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Wendy Miller and Mark Gregg, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful actions will not be used against them in any way.

DESERT AGGREGATES

Michelle M. Smith, Esq. and *Karen Reichmann, Esq.,* for the General Counsel.

Paul V. Simpson, Esq. (Simpson, Garrity & Innes), of South San Francisco, California, for the Respondent.

Matthew J. Gauger, Esq. (Van Bourg, Weinburg, Roger & Rosenfeld), of Sacramento, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Tulare, California, on April 10 and 11, 2002. On January 8, 2001, Operating Engineers Local 3, International Union of Operating Engineers, AFL–CIO (the Union) filed the charge in Case 32–CA–18653 alleging that Desert Aggregates (Respondent) committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Union filed the charge in Case 32–CA–18726 on February 16, 2001. On June 29, 2001, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing against Respondent, in both cases, alleging that Respondent violated Section 8(a)(1), (3), and (5) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Utah corporation, with an office and place of business in Ducor, California, where it is engaged in quarrying and processing stone aggregates and the production of asphalt. During the 12 months prior to issuance of the complaint, Respondent sold and shipped goods valued in excess of $50,000 directly to customers located outside the State of California. Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

The complaint alleges that Ben Boyd, plant superintendent, unlawfully threatened to replace employees if the plant became unionized. The complaint further alleges that labor consultant, William Scott, solicited grievances and promised to remedy grievances if the employees voted against representation. The complaint further alleges that Respondent unlawfully laid off employees Wendy Miller and Mark Gregg, and granted employee Daniel Harris a wage increase in order to discourage union membership and activities.

The General Counsel and the Union argue that the Respondent's unlawful conduct here was so egregious and pervasive that it created a coercive atmosphere rendering impossible the holding of a fair representation election. They assert that the only appropriate remedy given the severity of the Respondent's conduct is the imposition of a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

B. Facts

During November and December 2000, the Union held a series of meetings for the employees of Respondent's production and maintenance employees.[2] On December 19, six employees signed a petition authorizing the Union to represent them for the purposes of collective bargaining. By January 3, 2001, the Union had obtained signatures on the petition from 8 employees in a bargaining unit of 11 employees. On January 5, 2001, union officials visited Respondent's facility and attempted to present a copy of the employee petition and a demand for recognition to Bruce Bunting, Respondent's general manager. Bunting would not accept the papers from the union officials and the documents were left on the floor of his office. Bunting later placed the documents in a sealed envelope. Bunting did not read the petition and did not have direct knowledge of which employees signed the petition. On January 8, the Union filed a representation petition with the Board in Case 32–RC–4845, seeking a representation election.

Employee Wendy Miller ended union meetings and signed the union petition on December 19, 2000. Prior to her layoff on January 5, 2001, Miller wore a union sticker on her hardhat and a union button on her coat while she was at work. Miller also handed out union stickers and buttons to other employees. Miller

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

[2] The appropriate bargaining unit consists of all full-time and regular part-time production and maintenance employees, plant operators, equipment operators, mechanics, laborers, utility persons and articulated dump truck drivers employed by Respondent at its Ducor, California, facility; excluding managerial employees, weighmasters, salespersons, office clerical employees, and all other employees, guards, and supervisors as defined in the Act. At the times material herein, there were approximately 11 employees in the bargaining unit.

discussed the Union with Gloria Uny, Respondent's office supervisor. Miller and Uny also discussed their belief that someone was leaking information about the employees' union activities to management. On January 4, 2001, Uny told Miller that two employees had told Bunting of the Union's organizing plans. Uny said that Respondent knew about the Union's plan to present Bunting with the union petition. Uny advised Miller to "watch her ass."

Employee Mark Gregg first contacted the Union in October or November 2000. Gregg helped set up the union meetings which led to the employees signing the union petition on December 19. Gregg testified that in December, Ben Boyd, then Respondent's plant manager, approached Gregg and told the employee that Boyd wished that the facility "would go Union" so that it would be easier for Boyd to "get rid of an employee and just call the [Union's hiring] hall" for a replacement. Boyd informed his supervisor, Bruce Bunting, Respondent's plant manager, of the Union's organizing effort between Christmas and New Years. Bunting then informed, Todd Hill, Respondent's regional manager, of the Union's organizing effort. Hill and an attorney met with Bunting on January 5, 2001, to discuss Respondent's strategy for the union campaign.

On January 3, the bargaining unit employees and the Union decided that the Union would present the petition to Bunting at the close of business on January 5. As stated earlier, on January 4, Uny told Miller that Respondent knew about the Union's plans and that Miller should watch her ass. Also on January 4, Bunting called employee Daniel Harris into his office and told Harris that he would be receiving a wage increase. Harris asked whether he was getting the raise because he deserved it or because of "the Union deal." Bunting said that the raise had nothing to do with the Union but then stated that he did not believe the employees needed a union. Harris received a $1.45-per-hour increase in his paycheck the following week.

On January 5, Respondent laid off Miller. Miller reported to work as usual that morning. While Miller was helping Uny in the office, Bunting called Miller into his office. Bunting told Miller he was laying her off because "things were slow." Bunting said he was retaining people with maintenance skills but was not keeping Miller because she could not perform maintenance work and because Miller was still recovering from a broken leg. On her way out of the office, Miller asked Uny if anyone else was being laid off. After Uny nodded yes, Miller asked if Gregg was being laid off. Uny again nodded yes. Gregg was not laid off that day because he was absent from work. Gregg was laid off on the next business day, January 8.

After finding out that Miller was laid off, Harris stated to Boyd that Harris expected to be laid off also. Boyd told Harris, "Hey, dude, I didn't have anything to do with it, it was all f—ing Brucie." Harris said that if Miller got laid off because of a lack of work it was okay. However, Harris said if Miller was laid off because of the Union, "it was bullshit." Boyd stated that he was for the Union. According to Boyd, he could get better employees from the Union. Boyd said he could get rid of employees he didn't like and replace them with employees from the union hiring hall.

After Miller informed the Union that she had been laid off, Union Agents Ras Stark and Todd Doser went to Respondent's facility. Stark, Miller, and Doser presented the union petition to Bunting. However, Bunting, believing he was being given union authorization cards refused to accept the petition. Doser read the petition demanding union recognition to Bunting and then placed the petition on the floor. As stated earlier, Bunting placed the petition in an envelope and sealed it. Bunting did not open the envelope until the instant hearing.

Bunting planned to lay off Gregg on January 5. However, Gregg was absent from work that day. On January 8, Bunting called Gregg into his office and told Gregg of his layoff. Bunting said that the layoff was because business was slow. That same day, the Union commenced an informational picket at the gates to Respondent's facility. Also on January 8, the Union filed its representation petition in Case 32–RC–4845. On January 12, the Union presented another petition to Bunting, urging Respondent to reinstate Miller and Gregg to their jobs and again requesting that Respondent recognize and bargain with the Union. On January 15, 2001, Respondent and the Union stipulated to a Board-conducted election to be held on February 16, 2001. On February 15, the Union notified the Regional Director that it wanted the election blocked by the instant unfair labor practice charges. The election was postponed pending resolution of the instant case.

In the weeks leading up to the proposed February 16 election, Boyd spoke to employees individually about the Union. On January 19, the Union presented Boyd with a petition asking for restrictions on Respondent's campaign tactics. In addition, Bunting held meetings for employees to discuss the Union. Bunting asked the employees "to give us a year and things will change." Bunting told employees that the Union would still be there in a year, and employees should wait and see what changes Respondent would make during the following year.

During the week ending February 15, William Scott, Respondent's labor consultant, held captive audience meetings with the employees. Scott told the employees that the organizing drive had "rung bells all the way to the top" of the Company. Scott also asked the employees to "give the company a year" and to see what changes would be made. Scott approached employees Bill Perry and Harris at their workstations. Scott told the employees that the organizing drive had "rung bells all the way to the top" and that if the employees would just "give the company a year, things would change." Scott also told the employees "Ben Boyd was on his way out." Respondent knew for some time that a number of employees were unhappy with the way that Boyd treated employees. Scott had previously informed Bunting that the employees' principal concerns in going to the Union were Boyd's treatment of employees and fringe benefits.

On February 15, Bunting held his last captive audience speech and again asked that employees give the Company a year. After this meeting, Harris and Perry approached Bunting and stated that they would take him up on his offer. Perry and Harris later called Stark and asked him to cancel the election. After, the election was postponed, Bunting called another employee meeting. Bunting told the employees that the election was postponed but not canceled. Bunting stated that because the election was still pending, his hands were tied and that he could not make any changes. Bunting said everything would be "on hold" until things were "settled."

In its defense, Respondent offered evidence that Harris had requested a wage increase on December 15, 2000. On December 18, Bunting promised Harris a wage review at the first of the year. Pursuant to that promise, Bunting met with Harris on January 4 and informed Harris that Harris would receive a $1.20-per-hour raise. However, Respondent's computerized payroll system set Harris' wage rate at $1.45 above his previous rate. Respondent granted Harris a $1.45 wage increase in order to have the new wage rate conform to its computerized payroll system. The evidence further reveals that four unit employees had received wage increases between October 27 and Harris' request for a raise on December 15. Those wage increases ranged from $1 to $4 per hour.

Respondent offered strong evidence sales for January and February in 2000 required a reduction in the work force. In late 2000, Bunting determined that sales for January and February 2001 would be very slow. Thus, Bunting concluded that a reduction in force would also be necessary in the early part of 2001. Bunting decided that he would reduce labor costs at the beginning of the year. The evidence supports Respondent's claim that a reduction in force was economically justified. The issue resolves itself into whether the choice of employees Gregg and Miller for layoff was based on union considerations. According to Bunting, he decided to retain those employees who could "be most help in doing winter repair work on all the plants and all the equipment" when the need for production was less.

Bunting testified that Gregg did not possess the welding and cutting skills that his coworkers possessed. Gregg's primary job was to run Respondent's rock plant. Several of Respondent's other employees could also perform this work. Bunting testified that Harris could operate the rock plant and also do mechanical and welding work. In addition, employees Soto, Groves, Perry, Theiman, and Barrera could do welding, cutting and fabrication. Bunting further testified that Barrera was a better rock plant operator than Gregg.

Bunting testified that Miller was chosen for layoff because "her skill set was limited relative to the other plant employees." Miller was not able to operate heavy equipment such as front-end loaders, bulldozers, rock drills, cranes, or bobcats. Miller could not perform welding, cutting or fabrication work. Miller drove the water and haul trucks. She also was trained to run the scales and do lab testing. Respondent had other employees who could operate the trucks, weld, run the plant and do lab work. Miller had been assigned office work to help Uny. However, in the winter months, the work in the scale house and the office slowed down. Prior to laying off Miller, Bunting spoke with Uny to find out whether Miller was needed in the office. Bunting was satisfied that there was not enough office work to justify retaining Miller during the reduction in force. Both Miller and Gregg were told that they would be called back to work if and when business picked up.

By the end of March 2001, sales had substantially increased at the plant. Accordingly, on March 27, 2001, Respondent issued Gregg a recall notice. On April 2, 2001, Respondent sent Miller a recall notice. Consistent with Respondent's past practice, the two employees were advised that they would have a 3-month waiting period before their health insurance coverage resumed. Respondent's policy was that company-paid medical coverage would continue to the end of the calendar month in which the employee was laid off or terminated.

In their recall notices, Gregg and Miller were both requested to provide medical releases to return to work. Respondent requested that Miller provide a medical release because she was on limited duty at her doctor's instructions at the time of her lay off. Miller was recovering from a broken leg. Respondent requested a medical release from Gregg because he had filed a workers' compensation claim in early January 2001. Miller and Gregg both declined to return to work.

C. Conclusions

1. The independent 8(a)(1) allegations

Boyd told employees that he favored the Union because, if Respondent was a union company, it would be easier for him to get rid of employees and replace them with employees from the Union's hiring hall. While Boyd expressed support for the Union, his statements could easily be understood as threats to replace current employees with employees from the hiring hall. I find that by such conduct, Respondent violated Section 8(a)(1) of the Act.

As stated earlier Bunting told the employees to "give us a chance and things will change." In the last week before the scheduled election, William Scott, labor consultant, asked employees what their "issues" were. He then asked the employees to "give the company a year," so that things would change. I find by this conduct Respondent solicited grievances and promised to remedy the grievances in order to discourage union activities. See, e.g., *Traction Wholesale Center Co.*, 328 NLRB 1058 (1999). For example, Scott determined that the employees had gone to the Union in major part because of unhappiness with their treatment by Boyd. Scott later told employees that Boyd "was on his way out."[3] After the election was postponed, Bunting told the employees that changes couldn't be made because the election was postponed and not canceled.

2. The wage increase given to Daniel Harris

The granting or withholding of benefits in order to discourage union activity is proscribed by Section 8(a)(1) of the Act. In *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), the Supreme Court stated: "The danger inherent in well timed increases in benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."

In *ARA Food Services*, 285 NLRB 221, 222 (1987), the Board stated:

> When a benefit is granted during the critical period before an election, the burden of showing that the timing was governed by factors other than the pending election is on the party who granted the benefit. The logic behind this legal principle is clear: only the party granting the benefit can explain why it chose to do so. An employer meets that burden if it presents evidence which establishes justification for its action.

[3] Boyd quit Respondent's employ in mid-March 2001.

See also *Comcast Cablevision*, 313 NLRB 220 (1993); *Elston Electronics Corp.*, 292 NLRB 510, 525–526 (1989).

In examining whether the wage increases amounted to an objectionable promise or grant of benefit, I must apply the test set out by the Board in *B & D Plastics, Inc.*, 302 NLRB 245 (1991). Under *B & D Plastics*, the Board examines whether granting the benefit would tend unlawfully to influence the outcome of the election, taking into consideration the following factors: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit.

In the instant case, Harris was told on December 18 that he would receive a wage review after the first of the year. After Bunting learned of the union organizing drive, he gave Harris the wage review that he had previously promised Harris. In the previous 2 months, four employees had received wage reviews and increases ranging from $1 per hour to $4 per hour. Harris' wage increase fell squarely within that range. When Harris questioned whether the raise was based on the merits or because of the union activity, Bunting stated that the Union had nothing to do with the raise.

I find that Respondent has met its burden of showing that the timing was governed by factors other than the pending election. First, the testimony of Bunting and Harris establishes that Bunting promised Harris a wage review to be given at the first of the year. This occurred prior to Bunting's knowledge of the union activity and was pursuant to Harris' request for a raise. Further, Bunting had granted similar raises to four other employees in the prior 2 months, again without any knowledge of union activities.

Thus, I find that the announcement of the wage increase and the granting of that wage increase did not violate Section 8(a)(1) of the Act.

3. The layoffs of Wendy Miller and Mark Gregg

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). To sustain his initial burden, the General Counsel must show: (1) that the employee was engaged in union activity; (2) that the employer was aware of the activity; and (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue, which the expertise of the Board is peculiarly suited to determine. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999), citing *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994).

I have found that Respondent has established strong economic justification for a layoff in early January 2001 based on its poor sales in January and February 2000 and the poor sales situation existing in late December 2000. Based on these sales figures, Bunting reasonably determined that he had to reduce labor costs for the first quarter of 2001. As stated earlier the issue is whether the selection of Miller and Gregg for layoff over less senior employees was motivated by unlawful union considerations.

As found earlier, Gregg was the employee who first contacted the Union. Bunting admitted that he believed Gregg was a leader in the organizing drive. Boyd told Gregg that Boyd could get rid of employees he did not like and replace them with employees from the union hall. It is undisputed that Boyd and Gregg did not like each other.

Miller wore union stickers and buttons at work. Boyd worked in the plant at the time and it is reasonable to assume that he saw Miller's union insignia. Further, Miller openly discussed the union organizing drive with Office Supervisor Uny. On January 4, 2001, Uny told Miller that Respondent knew about the Union's plan to present Bunting with the union petition. Uny told Miller to "watch her ass," strongly implying that Miller's union activities had placed her job in jeopardy.

Thus, the burden shifts to Respondent to establish that the same action would have taken place in the absence of the employees' union activities. Where, as here, the General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont, Inc.*, 271 NLRB 443 (1984).

Based on reduced production in the first quarter of 2001, Respondent intended to perform maintenance and repairs while production was slow. Thus, Bunting decided to retain employees who could operate the machinery and also perform mechanical, welding, cutting, and fabrication work. Although more senior than some other employees, Gregg did not possess these skills. Miller could only operate the water and haul trucks. She could not operate some of the larger equipment and could not do the mechanical and maintenance work. While Miller was trained to work the scales and do lab work, that work was slow during the winter. Further, before laying off Miller, Bunting checked to see whether there was enough office work to justify retaining Miller. Bunting determined that the office work was also down.

Thus, I find that Respondent has established, due to a downturn in business, employees Miller and Gregg would have been laid off even in the absence of any union activities.

4. The bargaining order

The General Counsel and the Union argue that the Respondent's unlawful conduct here was so egregious and pervasive that it created a coercive atmosphere rendering impossible the holding of a fair representation election. They assert that the only appropriate remedy given the severity of the Respondents'

conduct is the imposition of a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

In *NLRB v. Gissel Packing Co.*, supra, the leading case on remedial bargaining orders, the United States Supreme Court held:

> (1) Even in the absence of a demand for recognition, a bargaining order may issue if this is the only available effective remedy for unfair labor practices.
>
> (2) Bargaining orders are clearly warranted in exceptional cases marked by outrageous and pervasive unfair labor practices.
>
> (3) Bargaining orders may be entered to remedy lesser unfair labor practices that nonetheless tend to undermine majority strength and impede the election process. If a union has achieved majority status and the possibility of erasing the effects of the unlawful conduct and of ensuring a fair election through traditional remedies is "slight," a bargaining order may issue.

Because this case falls within category 3, I have, as mandated by the Supreme Court in *Gissel*, examined the extensiveness of the Respondent's unfair labor practices and the likelihood of their recurrence in the future. In this regard, I observe that the unfair labor practices committed in this case include threats to replace current employees with employees from the union hall and the soliciting of grievances with the promise of remedying such grievances. The Respondent committed such unfair labor practices in a small bargaining unit of 11 employees

All bargaining unit employees were directly affected by the Respondent's misconduct. Having learned in late-December that its employees were engaged in union organizing, Respondent embarked on a campaign of "give the company a year and things will change." A course of unlawful conduct designed to undermine employee support for the Union. As noted Boyd also threatened to replace employees with employees from the union hall. The Board has long held that "threats to eliminate the employees' source of livelihood have a devastating and lingering effect on employees, an effect that most effectively can be remedied by an order to bargain." *New Life Bakery*, 301 NLRB 421, 431 (1991); *White Plains Lincoln Mercury*, 288 NLRB 1133, 1140 (1988).

In *Burlington Times, Inc.*, 328 NLRB 750 (1999), the Board found that the respondent-employer unlawfully granted employees increased benefits in order to discourage union activities. The Board also found that the respondent-employer had unlawfully solicited grievances and promised to remedy them, threatened plant closure, promised wage increases, and an improved benefit plan. Nevertheless, the Board reversed the bargaining order recommended by the administrative law judge stating, "Although the [respondent-employer's] unfair labor practices were serious, they are not of a nature likely to have so lasting an effect that traditional remedies would be inadequate to ensure a fair election." The unfair labor practices in that case were of a more serious nature and greater number than present in the instant case.

In *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1399 (2000), the respondent-employer threatened employees with closure of the facility, interrogated employees, solicited grievances and promised to remedy them, and granted wage increases to the main union activists. The Board affirmed the administrative law judge's denial of bargaining order. Again, I find that the unfair labor practices in that case were of a more serious nature and greater number than present in the instant case. Accordingly, I find that a bargaining order would not be appropriate in the instant case.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with replacement and by soliciting employee grievances and promising to remedy them, Respondent violated Section 8(a)(1) of the Act.

4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

On the foregoing findings of fact and conclusions of law, and upon the entire record, I issue the following recommended[4]

ORDER

The Respondent, Desert Aggregates, Ducor, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with replacement in order to discourage union membership or activities.

(b) Soliciting grievances and promising to remedy grievances in order to discourage union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Ducor, California facilities copies of the attached notice marked "Appendix".[5] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps

[4] All motions inconsistent with this recommended order are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

shall be taken by the Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since December 15, 2000.

(b) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, at San Francisco, California, May 28, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated Section 8(a)(1) of the National Labor Relations Act, as amended, and has ordered us to post and abide by this notice.

The National Labor Relations Act gives all employees the following rights

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT threaten to replace, discharge or otherwise discipline employees in order to discourage union membership or activities.

WE WILL NOT solicit employee grievances and promise to remedy employee grievances in order to discourage union membership or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

DESERT AGGREGATES